



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Lambda Signatics, Inc.

File: B-238504

Date: June 1, 1990

Gilbert J. Ginsburg, Esq., Epstein Becker & Green, P.C., for the protester.

Col. Herman A. Peguese, Office of the Assistant Secretary, and Gregory H. Petkoff, Esq., Office of the General Counsel, Department of the Air Force, for the agency.

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DIGEST

Protest that agency took an unreasonable amount of time to qualify protester's transmitters is denied where the record shows that the agency continually evaluated the protester's submissions but the transmitters never passed all required qualification tests.

DECISION

Lambda Signatics, Inc., protests that it was not afforded a reasonable opportunity to meet the solicitation requirement for approved source status under request for proposals (RFP) No. F41608-89-R-3002, issued by the Department of the Air Force for fuel transmitters for the T-38/F-5A aircraft.

We deny the protest.

The RFP, issued on June 27, 1989, requested prices for quantities of 91, 136, or 181 fuel transmitters. The transmitters, which are used to detect the amount of fuel in the fuel cells of the T-38/F-5A aircraft, are considered a safety in flight item because they are relied on by the pilot to determine the quantity of fuel available. The Commerce Business Daily (CBD) notice announcing the procurement, published on June 9, 1987, provided that a sole-source contract would be awarded to Simmonds Precision Products, Inc., on the basis that Simmonds was the only responsible source available to provide the transmitters and

C48653 / 141500

no other type of supplies or services would satisfy the agency requirements. The RFP also specified Simmonds as the only identified source for the transmitters. It provided, however, in clause M-25, Evaluation of Proposals Submitted Based Upon Data Not Included in the Solicitation, that offers from firms not previously identified as sources for the requirement would be considered for award if certain requirements were met. The provision also noted that the Air Force did not have a complete data package for the part.

On July 28, 1989, the closing date for the receipt of proposals, Simmonds and Lambda, an unapproved source, submitted proposals. In its proposal Lambda indicated that complete drawings and technical data for its transmitters were currently under evaluation by the Air Force Directorate of Materiel Management. Subsequently, on August 15, 1989, the Air Force buyer notified the Competition Advocacy Office and the inventory manager that Lambda had submitted the low offer and requested the inventory manager to determine if the contract award could be delayed until Lambda's transmitters were evaluated. The inventory manager responded that the requirement was urgent and could not be delayed. Thus, while Lambda's transmitters were still being evaluated, the Air Force continued to consider Simmonds' proposal and on December 12 concluded negotiations with the firm. Before awarding Simmonds the contract for 136 transmitters on January 29, 1990, the buyer requested a status update on Lambda's source approval and was notified that the estimated completion date was March 30, 1990. The buyer also verified that the transmitters were still urgently needed. After this protest was filed the Air Force changed the contract to require 32 transmitters with an option to purchase an additional 104 transmitters. To date, Simmonds has been authorized to supply 38 transmitters.

Lambda does not dispute the urgency of the need for the transmitters, but protests that it has been denied a reasonable opportunity to qualify for award. Lambda reports that it has been working with Kelly Air Force Base to become qualified as a second source to provide the transmitters since 1987. Lambda avers that during August 1988 the Air Force agreed to qualify Lambda's transmitters on the basis of form, fit and function tests and to run the remainder of the tests as part of first article testing and approval after Lambda was awarded a contract. Lambda complains, however, that in January 1989, the Air Force reneged on its agreement and changed the approval process to require complete testing before approval would be granted.

Lambda also contends that the Air Force violated 10 U.S.C. § 2319 (1988). This statute contains provisions concerning

prequalification testing and quality assurance procedures. Generally, any qualification requirement must be justified, and standards which a potential offeror must satisfy in order to be qualified must be specified. Potential offerors are to be provided an opportunity to demonstrate their ability to provide an acceptable product and an agency must promptly advise offerors whether qualification was attained and, if not, why not. In addition, under certain circumstances, the contracting agency is required to bear the cost of testing and evaluating the product of a small business concern.

Regarding alleged violation of the above statute, Lambda first asserts that the Air Force did not provide prompt notice of the precise requirements it would have to comply with to become approved. Specifically, Lambda says that the CBD announcement did not provide the qualification requirements and that, in fact, the Air Force consistently changed the requirements until February 1989 (19 months after the procurement began), when it provided Lambda with a pamphlet entitled Qualification Requirements for the T-38/F-5 Tank Units. Lambda also argues that it was not provided with a prompt opportunity to demonstrate that its transmitters would meet the agency's needs and that if it had been it would have qualified in time to be considered for award under the protested solicitation even after the Air Force changed the approval procedure. Specifically, Lambda states that in August 1989, after Lambda failed certain tests which were preliminary to the Air Force performing other tests, it submitted a failure analysis report to the Air Force and the agency did not schedule a visit to witness the retest until 2 months later. Lambda further complains that in November 1989, it informed the Air Force that it completed certain tests and was ready for form, fit and function tests but the Air Force did not schedule them until March 1990, more than 4 months later. Lambda reports that, according to the Air Force, the reasons for this delay are that it did not have sufficient funds and it could not schedule the tests for the November to December time period in advance but had to wait until it witnessed the tests in November.

Moreover, argues Lambda, it has been over 32 months since it began attempting to qualify its transmitters, and this in itself demonstrates that the Air Force has taken an unreasonable amount of time. Lambda contends that other agencies have qualified transmitters in 5 to 11 months, and Kelly itself has qualified a transmitter in a shorter period of time using a first article testing approval process. Furthermore, Lambda contends that contrary to 10 U.S.C. § 2319, the Air Force did not specify an estimate of the costs of testing and evaluation likely to be incurred and

did not provide Lambda with prompt notice that it did not obtain qualification and the reasons therefor. Lambda requests reimbursement of the costs it incurred in undergoing evaluation and testing.

Finally, Lambda avers that insofar as the Air Force justified its 4-month delay in scheduling the form, fit and function tests of the hardware Lambda submitted in November on the basis of budgetary cutbacks, and because it could not schedule these tests for the November to December time frame in advance or when it witnessed the test performance at Lambda's facilities in November, the agency has violated the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(f)(5)(A). The cited provision of the act prohibits procuring agencies from relying upon a lack of advance planning or concerns related to the amount of funds available to justify a sole-source award.

In response, the Air Force first notes that the purchase of the transmitters began as routine but became urgent in August 1989, due to grounded aircraft and priority back-orders. The Air Force then explains that for a contractor to become qualified as a source for the transmitters it must demonstrate compliance with part number EA805FBW2941 and the Northrop and Military fuel gaging system specifications. The Air Force asserts that it never expanded or changed that requirement. The Air Force acknowledges that at some point it did agree at a meeting with Lambda to qualify Lambda on the basis of first article testing. The Air Force asserts that this was before Lambda failed certain qualification tests for a second time and that, in any case, the engineering activity responsible for source approval refused to add Lambda to the approved source list until it completed qualification testing. Further, comments the Air Force, it did not have a complete data package to establish a qualification requirement but that in an effort to assist Lambda, the engineers compiled a document entitled Qualification Requirements for T-38/F-5 Tank Units.

Finally, the Air Force contends that any delay in the evaluation of Lambda's transmitters was reasonable. In this regard, the Air Force states that while the approval process began in 1987, the fact is that the process was ongoing and that Lambda did not at any point pass all the required tests. In fact, asserts the Air Force, when Lambda submitted its final test report in January 1990, it still had not completed the explosive atmospheric test and the Air Force cannot proceed with flight testing until all environmental testing is completed. The Air Force also notes that Lambda submitted 25 source approval requests in 1 year,

with 17 of those submitted within a 4-month period, which is double the agency's annual work load.

Considering Lambda's protest that the Air Force took an unreasonable amount of time to qualify Lambda's transmitters, a procuring agency may limit competition for the supply of parts if doing so is necessary to ensure the safe, dependable and effective operation of military equipment. However, under 10 U.S.C. § 2319, a potential offeror may not be denied the opportunity to submit an offer and have it considered for a contract solely because the offeror has not met a prequalification requirement if the offeror can demonstrate to the satisfaction of the contracting officer that its product meets the standards established for qualification or can meet such standards before the date specified for award. Howmet Turbine Components Corp., B-224529, Feb. 13, 1987, 87-1 CPD ¶ 160. Here, we do not agree that the Air Force took an unreasonable amount of time to qualify Lambda's transmitters.

First, we do not find that the period of time it has taken the Air Force to qualify Lambda's transmitters is unreasonable per se. While the overall length of time has been long, the evaluation process has been ongoing. Lambda initially submitted a source approval package in August 1987, which was disapproved because the drawings were inadequate, the Northrop specifications were not addressed, and no transmitter was submitted for form, fit and function testing. Lambda then submitted transmitters in January 1988 which were not tested because of their poor quality. Next, Lambda redesigned the transmitters and resubmitted them in March 1988. These transmitters were rejected because they were out of tolerance. The qualification process continued with Lambda submitting test results and transmitters and the Air Force evaluating the submissions until January 1990. At no time, however, did Lambda's transmitters pass all required tests. In fact, as noted above, to this date, Lambda has not completed all testing required before the Air Force can perform flight testing and grant Lambda final approval.

We also note that we have thoroughly reviewed the internal memoranda provided by the Air Force in its protest report. The memoranda do not show any evidence that the Air Force was deliberately delaying the qualification of Lambda's transmitters or was otherwise acting in bad faith. Rather, the memoranda show that the Air Force was interested in having Lambda qualified as a second source, and, to this end, was seeking to advance that process. Thus, the memoranda show coordination between different activities within the Air Force to determine the

steps that Lambda needed to follow. The memoranda also show that while the Air Force could not delay the award because aircraft were being grounded due to missing transmitters, the Air Force was concerned that it award Simmonds only the minimum quantity of transmitters that were needed until Lambda obtained source approval. Thus, the Air Force has made an award to Simmonds for a limited quantity of transmitters with an option for the additional quantity, while Lambda's transmitters are undergoing source approval.

Lambda also complains specifically that the Air Force did not schedule a visit to witness a retesting of Lambda's transmitters until 2 months after Lambda submitted a failure analysis report and that the Air Force did not schedule form, fit and function tests until 4 months after Lambda submitted a final test report in November 1989. Regarding the period between August and October, the record shows that the Air Force was reviewing the failure analysis report, as well as requesting assistance from other agencies familiar with the transmitters to help it both review the report and witness retesting. With respect to the delay in November, the record shows that when the final test report was submitted, the Air Force requested the proper division to initiate the tests and, further, that Lambda contributed and continues to contribute to the delay, as it still has not submitted all required test data. While Lambda disagrees that a certain atmospheric test should be required and has requested that it be waived, the fact is, that as of this time, completion of the test is a requirement and the Air Force cannot complete its testing and evaluation until the results are submitted. Nor do we agree that the Air Force practice of not scheduling tests until it has witnessed certain preliminary tests indicates a violation of CICA's prohibition against relying on the lack of advance planning to justify a sole-source contract, since the Air Force could not know in advance when a contractor would pass the preliminary tests and be ready for final evaluation.

Lambda also requests that the Air Force be required to reimburse Lambda for the costs of evaluation and testing. Under applicable regulation, the contracting agency is required to bear the cost of conducting specified testing and evaluation for a small business concern which has met the standards specified for qualification and could reasonably be expected to compete for a contract for that requirement. Federal Acquisition Regulation (FAR) § 9.204(a)(2) (FAC 84-11). This provision applies if it is determined in accordance with agency procedures that such additional sources or products are likely to result in cost savings from increased competition for future requirements sufficient to amortize the cost incurred by the agency

within a reasonable period of time considering the duration and dollar value of anticipated future requirements. Here, Lambda has not yet met all the specified standards for qualification and the Air Force has not made the relevant determination required by FAR. Accordingly, at this time, Lambda is not entitled to reimbursement of the costs it incurred in the evaluation and testing of its transmitters.

The protest is denied.



for James F. Hinchman
General Counsel